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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **PABLO RAMIREZ,** **Defendant and Appellant.**	**A120631** **(San Mateo County Super. Ct. No. SC060870)**

Defendant Pablo Ramirez (appellant) appeals his conviction by jury trial of attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1] and assault with a semi-automatic firearm (§ 245, subd. (b)).[2] As to both counts the jury found true enhancement allegations for personal firearm use (§ 12022.53, subd. (d)) and infliction of great bodily injury (§ 12022.7, subd. (e)).[3] Appellant was sentenced to 34 years to life in state prison. On appeal, he contends the court erred in failing to instruct the jury sua sponte regarding attempted voluntary manslaughter and voluntary intoxication, the prosecutor committed

[1] All undesignated section references are to the Penal Code.

[2] We note that this was the second trial in this case. In the first trial, the jury could not reach a unanimous verdict and a mistrial was declared.

[3] The jury acquitted appellant of kidnapping (§ 207, subd. (a)) and rape (§ 261, subd. (a)(2)), and found not true an allegation that the attempted murder was deliberate and premeditated (§ 189).

misconduct, and the court erroneously sentenced him to the upper term on the attempted murder count. We affirm.

BACKGROUND

Rosa V. (the victim) met appellant in April 2005. They became friends, although the victim was living with Gonzalo Blanco. In October, the victim borrowed $4,000 from appellant. They had consensual sex on two occasions, in November and December. Thereafter, their relationship began to change; appellant became more possessive of the victim and wanted to control her. Although the victim told appellant the relationship was not working, he continued to pursue her. In early January 2006, appellant told the victim he still wanted to have more than just a friendship with her and wanted to marry her.

On the afternoon of January 10, 2006, appellant called the victim on her cell phone, told her he was drunk, at a motel, could not drive, and asked her to give him a ride home. The victim replied that she was working and he should call her later. When he called her again, she agreed to give him a ride when she finished working. Appellant gave her directions to a Motel 6 in Fremont. She planned to tell him not to bother her anymore.

When the victim arrived at the motel, she called appellant and he told her to come up to his room. The victim knocked on appellant's motel room door. Appellant opened the door, pointed a gun at the victim's face, and demanded she enter the room. Inside, appellant demanded that the victim drink a glass of wine. According to the victim, appellant ordered her to remove her pants and raped her while pointing the gun at her chest. While doing so he told her to tell him she loved him and wanted to marry him. She complied because he was pointing the gun at her.

Before appellant and the victim left the motel room appellant put the gun in his jacket pocket and told the victim not to try anything, "because I know where your children are; I know where they live." At gunpoint, he led her to her car, and forced her inside. For a brief period, appellant left the victim in her car while he returned his room key to the motel office. He then entered the passenger seat of the car and they headed for Redwood City. En route appellant repeatedly told the victim he loved her, wanted her to

marry him, and she "had to be his." He also said, "[y]ou left me no other choice but to do it this way." At some point, the victim told appellant she loved him and wanted to be with him, because that is what he wanted to hear. At one point during the drive, appellant told her to pull over to the side of the freeway. She did so and he vomited out the car window.

They then drove to the Redwood City building where appellant lived and the victim pulled up in front of the building next to a parked taxi. Appellant then ordered her to drive around the corner. She did so, stopped the car, left the car running and her foot on the brake, and told him to get out of the car. He asked her to kiss him and when she refused, he asked her if she loved him. She said, "no," hit the steering wheel, looked at appellant, and told him to get out of the car. Appellant then told her "if [she] wasn't going to be his, [she] wasn't going to be anyone's." He grabbed her by the neck, put her in a headlock and pulled her toward his chest. He then removed the gun from his pocket, and placed it against her head. The victim heard a gunshot and felt blood running down her face. She then heard three more shots fire in rapid succession.

Appellant let go of the victim and she sat up and told him to get out of the car. He tried to grab her cell phone when she tried to open it. He then told her he was sorry and exited the car. When the victim looked in the car's side mirror she saw appellant pointing the gun at her head. She quickly drove off and eventually saw a police car and asked the officers for help. She told them appellant had shot her and described appellant's clothing. According to police, at about 10:00 p.m. they were contacted by the victim who had suffered multiple gunshot wounds and was "very hysterical, very upset."

As a result of the shooting the victim suffered gunshot wounds to her scalp, left arm and left breast. Two bullets lodged in her left breast and one passed through her left arm. She also suffered what appeared to be a flash powder burn on her left index finger from the discharge of the gun.

Atherton Police Officer Devlugt was on patrol when he received a dispatch bulletin describing the victim's attacker and that a handgun was used in the shooting. At 10:23 p.m., Devlugt saw a man, later identified as appellant, matching the description of

the suspect, walking in unincorporated Redwood City. Devlugt briefly lost sight of appellant and, moments later, stopped a taxi carrying two passengers, one of whom was appellant. Devlugt ordered appellant out of the taxi, handcuffed him and noticed blood on his hands and shirt. No firearm was found on appellant's person or in or around the taxi.

Redwood City Police Detective Reynolds interviewed appellant at the police station between midnight and 1:00 a.m. on the night of the shooting.[4] Appellant appeared "very nonchalant, unconcerned" and "flippant." Only when Reynolds asked if he was concerned about the victim did appellant express "some sort of concern." When Reynolds asked about the source of the blood on his clothing, appellant said he had fallen down. Appellant said he had had too much to drink and could not remember what happened that night. He described the victim as a "friend," and said he had not seen her for three days. He denied owning a gun or firing one that night.

Reynolds swabbed appellant's hands and face for gun shot residue. He also took buccal (cheek) swabs of appellant and the victim to test for DNA. Appellant's cell phone had the victim's image as its screen saver and revealed five calls placed to the victim on January 10, the last at 8:20 p.m. The victim's cell phone was bloody and revealed three calls from appellant on January 10, the last at 8:20 p.m.

According to the testimony of a criminalist, the gun shot residue swabs taken from appellant revealed many highly specific particles of gun shot residue on both of his hands and his face, consistent with having an arm around the victim in a headlock and firing with his right hand.[5]

At approximately 2:00 a.m. on January 11, Reynolds also administered two blood alcohol screening tests to appellant, two minutes apart. The results were .0993 and .0973,

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4 The video recorded interview was played for the jury, and it and a transcript of the interview were admitted into evidence.

5 On cross-examination, the criminalist testified that the gunshot residue could also have been deposited on appellant if the victim was shot at by someone outside the car while she was seated next to appellant.

which are slightly over the legal .08 limit. According to Reynolds, these test results, and the fact that appellant did not seem "overly intoxicated," were inconsistent with appellant's insistence that he could not remember what had occurred that night.

Reynolds conducted a second interview of appellant on the afternoon of January 11.[6] Appellant again said he did not remember what happened the prior evening because he had been very drunk. However, he also stated he met the victim at a Fremont Motel 6 the previous evening, was in the victim's car with her, and vomited when she stopped the car. He initially denied being covered in blood when arrested, but then said he had fallen down. He also said he wanted the victim to marry him, and she told him she was going to leave her husband.

On the morning after the shooting, an unloaded .25-caliber semiautomatic handgun was discovered in the bushes near the shooting scene. No shell casings were found in the area. The gun was swabbed for fingerprints and DNA. No usable fingerprints were found, but a DNA swab of the gun's slide grip revealed the victim's DNA. A DNA swab from the gun's safety latch revealed a mixture of DNA from three people; the victim was the primary source of the DNA on that part of the gun, and appellant could not be included or excluded as a DNA source. The gun's hammer had a DNA mixture from two persons. The test was inconclusive for the DNA of appellant, but revealed the victim as a possible DNA contributor.

A bullet and three shell casings were recovered from the victim's car. Ballistics tests concluded that the two bullets removed from the victim's chest and the three recovered shell casings were fired from the gun recovered from the bushes near the shooting scene.[7]

Isabel Arellano lived with appellant between September 1999 and October 2005, and they had a daughter together. In the summer of 2005, Arellano began thinking that

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[6] The video recorded interview was played for the jury, and it and a transcript of the interview were admitted into evidence.

[7] The parties later stipulated that the two bullets recovered from the victim's left breast were fired from the recovered firearm.

appellant was cheating on her. On September 30, appellant told Arellano that he was seeing "Elvira," identified at trial as the victim. In October, Arellano left appellant and moved out of their residence. Arellano visited appellant in jail on January 13, 2006. He told her he could not remember what had happened because he was very drunk. During a subsequent visit to the jail, appellant told Arellano he had shot the woman he had been seeing while he lived with Arellano. Appellant said he had lent the victim some money and shot her because he thought the victim was cheating on him. Appellant also told Arellano to go to Mexico, and his son would give her the money to do so.

Two or three weeks after the shooting, the victim told Blanco that appellant had raped her at gunpoint in the motel room, forced her to drive him home, and shot her because she told appellant she did not want to live with him or be with him.

The parties stipulated that the victim was the source of the blood found on appellant's clothing.

The thrust of the defense was appellant did not commit any of the charged offenses. Defense counsel argued that Arellano had a motive to shoot the victim.

DISCUSSION

I. *Attempted Voluntary Manslaughter Instruction*

The trial court instructed the jury on attempted murder (CALCRIM No. 600) and attempted murder with deliberation and premeditation (CALCRIM No. 601). It did not instruct on attempted voluntary manslaughter, a lesser included offense of attempted murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215-1216.) Appellant contends the court committed reversible error in failing to so instruct the jury sua sponte. We conclude any error in failing to instruct on voluntary manslaughter was invited.

During a discussion regarding jury instructions, the following colloquy between the court and counsel occurred:

"The Court: And we didn't request any lessers last time; not requesting any this time?[8]

"[Defense Counsel]: No.

"The Court: That, is, that is correct? You are not going to request any?

"[Defense Counsel]: Correct.

"[The Court]: Okay.

"[The Prosecutor]: Nor are the People. Thank you.

"[The Court]: Great. And it is my finding that, well, I will wait until you put on your defense. I will indicate, making a record, that the defense is, he didn't do it?

"[Defense Counsel]: Correct.

"[The Court]: And if he didn't do it, there is no lesser considerations. All right? [¶] Okay. Thank you very much."

"Invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction. [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

Appellant argues the doctrine of invited error should not apply because defense counsel mistakenly believed that the lesser included attempted voluntary manslaughter instruction was "not required" because the defense theory was factual innocence. He cites several cases which stand for the principle that, where supported by the evidence, the trial court must instruct on a lesser included offense even if it is inconsistent with the defense elected by the defendant (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7), or if the defendant claims to be innocent of both the greater and lesser offenses (*People v. Barton* (1995) 12 Cal.4th 186, 195-196).

Defense counsel did express a tactical purpose for rejecting an instruction on the lesser included offense when he agreed with the trial court that the thrust of the defense was that appellant did not commit the shooting, and tacitly agreed with the court's

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8 This statement was erroneous. In the first trial, the jury was instructed on the lesser included offense of attempted voluntary manslaughter (CALCRIM No. 603) pursuant to the parties' requests.

statement that, given that defense, no lesser instructions were necessary. Whether counsel's tactical choice was mistaken is irrelevant to our invited error determination. In *People v. Cooper* (1991) 53 Cal.3d 771, 831, our Supreme Court explained, "[T]he record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice."

We conclude appellant invited the error complained of on appeal and therefore need not consider the merits of his instructional error claim.

For the first time in his reply brief, appellant asserts that if the instructional error was invited, defense counsel's failure to request the attempted voluntary manslaughter instruction constituted ineffective assistance. Although we generally decline to consider arguments raised for the first time in the reply brief (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3), we will address the claim on the merits to forestall any later claim of incompetence of appellate counsel. Quite simply, because an attempted voluntary manslaughter instruction would have been inconsistent with defendant's theory of the case, we cannot say defense counsel had no rational tactical purpose for failing to request it. (*People v. Wader* (1993) 5 Cal.4th 610, 643.) Additionally, defense counsel could have made the tactical choice to take an all or nothing approach on the greater offense of attempted murder, rather than giving the jury the opportunity to convict on the lesser included offense of voluntary manslaughter. Such a tactical choice could have been bolstered by the jury's deadlock on all charges in the first trial.

II. *Voluntary Intoxication Instruction*

Next, appellant contends the court erred in failing to instruct the jury on voluntary intoxication pursuant to CALCRIM No. 625. He argues either the trial court had a sua sponte duty to so instruct, or defense counsel rendered ineffective assistance by failing to request such an instruction. He contends that as a result, the jury did not properly

consider whether his consumption of alcohol affected or negated the specific intent necessary for attempted murder, in violation of his rights to due process, fair trial, and fundamental fairness under the federal and state Constitutions.

CALCRIM No. 625 (2008) provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ <*insert other specific intent required in a homicide charge or other charged offense*>.] [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." The CALCRIM voluntary intoxication instruction applies to attempted murder. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; see also Judicial Council of Cal., Crim. Jury Instns. (2008) Authority to CALCRIM No. 625, p. 420.)

As appellant appears to concede, a trial court has no sua sponte duty to instruct that a defendant's voluntary intoxication may be considered in determining the absence of the required criminal intent. A defendant must request a voluntary intoxication instruction. (See *People v. Hughes* (2002) 27 Cal.4th 287, 342; *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) " ' "[W]hen a defendant presents evidence [of voluntary intoxication] to attempt to negate or rebut the prosecution's proof of an element of the offense [deliberation], a defendant is not presenting a special defense invoking sua sponte instructional duties." ' [Citation.] Instead, it is 'more like' a ' "pinpoint" ' instruction. [Citation.] Similarly, the omitted instruction in this case concerned the defense's attempt to dispute the element of deliberate intent, and resembled a pinpoint instruction." (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31-32, quoting *Saille*, at pp. 1117, 1119, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752-753, fn. 3.)

We next consider whether defense counsel was ineffective in failing to request the CALCRIM No. 625 instruction. A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

Moreover, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions. [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Appellant argues substantial evidence was presented that appellant was "extremely" intoxicated at the time of the shooting, and "any reasonably effective defense counsel, in an effort to avoid an attempted murder conviction . . . , would have requested an intoxication instruction." However, the theory of the defense was that appellant did not shoot the victim. As in *Wader*, because an instruction on voluntary intoxication as negating specific intent would have been inconsistent with appellant's theory of the case, we cannot say defense counsel had no rational tactical purpose in failing to request it. (*Wader, supra,* 5 Cal.4th at p. 643)

III. *Prosecutorial Misconduct*

Appellant next argues the following comments by the prosecutor during his rebuttal argument constituted prejudicial misconduct:

"[The Prosecutor]: . . . Let me start over by directing a comment [defense counsel] just made. [¶] He suggested to you, there's no way [appellant] made --

committed these crimes; didn't seem well planned out. [¶] Like, who would do something like that? Doesn't seem like a smart idea. Wasn't some grand plan, somebody else, [defense counsel] told me, I think is fitting in this case. Wasn't when we were in session. We were just talking.

"[Defense Counsel]: Objection.

"[The Court]: Just, excuse me. Sustained.

"[The Prosecutor]: Something an attorney once told me, you get, don't catch the smart ones. You don't catch the smart ones. So just because it doesn't like, seem like it was [a] well thought out plan, doesn't mean that [appellant] didn't do it or wasn't capable of what he did. Doesn't have to be some elaborate scheme."

At the close of argument, the trial court reprimanded the prosecutor:

"[The Court]: I was a little surprised and . . . disappointed that you attempted to get in before the jury whatever comment [defense counsel] may have made to you; that is beyond the pale. And I am going to have to think about it. But that is not something you should have tried to do. And I am surprised to learn that you think you can do that. That's just not appropriate. And it's not proper. And it's not allowed. So please don't do something like that again."

The next day, appellant filed a motion for mistrial or, in the alternative, a curative instruction. The motion asserted that after the court sustained defense counsel's objection to the prosecutor's comment regarding an out of court comment defense counsel made to him, the prosecutor's comment that, " '[h]e had spoken to an attorney who said, "They don't catch smart ones," ' " was, itself, improper because it impliedly referred to a conversation between defense counsel and the prosecutor.

The court denied the motion for mistrial, but gave the jury the following curative instruction: "I have been forced to take the extraordinary step of reconvening you for the purpose of delivering one additional instruction. [¶] Yesterday during his rebuttal, the prosecutor improperly relayed a conversation between himself and defense counsel, which was taken out of context. And that had absolutely no bearing on this case. [¶] As such the prosecutor's improper remarks amount to an attempt to prejudice you against the

defendant, were you to believe these. [¶] You were warned you [*sic*] insinuations and convicting the defendant on . . . the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improperly unsupported remarks. I would further remind you that the comments of counsel are not evidence, and that nothing I say, is intended to comment upon the evidence in this case. [¶] You are the sole judges of the facts in this case, and as such, you should limit your deliberations to the evidence that was properly admitted in this trial. [¶] Any weight given by you to the improper remarks of the prosecutor would amount to a violation of your oath as jurors."

Subsequently, appellant raised the prosecutorial misconduct issue in his motion for new trial. The court denied the motion on the grounds that the comments did not rise to the level required to grant a mistrial, and given the overwhelming evidence of guilt, any error was harmless.

Appellant contends the prosecutor's prejudicial misconduct was not alleviated by the court's curative instruction. He argues the prosecutor's comments improperly implied there was additional evidence known to the prosecutor but unavailable to the jury, and conveyed that defense counsel believed appellant was not one of " 'the smart ones,' " i.e., he was guilty. Quoting *People v. Pitts* (1990) 223 Cal.App.3d 606, 694, appellant also argues the curative instruction was ineffective because "A prosecutor's closing argument is an especially critical period of trial. [Citation.] Since it comes from an official representative of the People, it carries great weight . . . . [Citation.]"

In general, an appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) " ' "[T]he applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]

. . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

We conclude appellant has failed to establish the trial court abused its discretion. The court's curative instruction was immediate and clearly directed the jury not to consider the prosecutor's improper unsupported remarks and reminded them the arguments of counsel are not evidence. Jurors are presumed to follow the court's instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.) In addition, the evidence of guilt was extremely strong. Appellant shot the victim four times at close range while they were seated in the car. Gunshot residue was found on appellant's hands and face, and he was covered in the victim's blood when arrested. The gun used to shoot the victim was found in the bushes near appellant's home, bullet casings were found inside the victim's car and no casings were found outside. Two or three weeks after the shooting, while in jail, appellant told Arellano he had shot the woman he had been seeing. That the jury rejected a finding that the shooting was deliberate and premeditated and acquitted appellant of rape and kidnapping indicates that it carefully considered the evidence presented. Based on the record before us, the court properly rejected the contention that, but for the prosecutor's improper comments, there is a reasonable likelihood the jury would have reached a result more favorable to appellant.

IV. *Upper Term Sentence*

Appellant contends that pursuant to *People v. Sandoval* (2007) 41 Cal.4th 825 and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the court erred in imposing the upper term based on factors not found by the jury, admitted by appellant or fully litigated at trial or at the sentencing hearing. He also argues that because the court imposed a gun use/great bodily injury enhancement pursuant to section 12022.53, subdivision (d), it was improper to rely on great bodily injury as a factor in imposing the

upper term. (Cal. Rules of Court, rule 4.420(c).)[9] In sentencing appellant to the upper nine-year term on the attempted murder count the court stated: "So I will go through the factors in aggravation as outlined by [the prosecutor] and as set out in [rule 4.421]. [¶] This claim certainly involved great violence, great bodily injury. [¶] Just to remind everybody, when she turned him down the final time; he grabbed her by the head; pulled her to him; and shot her four times. [¶] Fortunately for her, his aim was not particularly good. Although one bullet did strike her within the head; went under her skin; did not penetrate the scalp; and exited. [¶] Obviously, he was armed with a weapon. [¶] The defendant had placed the victim in a particularly vulnerable position; that is, in her car, with the gun. [¶] And as I indicated . . . , and based on what he told her; if you won't be with me; you won't be with anyone. There was some measure of planning. [¶] Certainly, wasn't sophisticated and wasn't professional, but there was indication of planning. [¶] And again, he took advantage of their relationship, which was a position of trust to her, . . . into this situation. [¶] For those reasons, I find to be aggravation."

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the Supreme Court applied *Apprendi* to invalidate a state court sentence and explained the " 'statutory maximum' " is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In *Cunningham*, the Supreme Court applied *Apprendi* and *Blakely* to California's then existing determinate sentencing law (former § 1170, subd. (b)), which provided "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Stats. 2004, ch. 747, § 3; *Cunningham, supra,* 549 U.S. at p. 277.) The Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term'

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9 All further rule references are to the California Rules of Court.

sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the *Sixth* and *Fourteenth Amendments*." (*Cunningham,* at p. 274.)

In response to *Cunningham*, the Legislature remedied the constitutional infirmities by amending section 1170 by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2; see *Sandoval, supra,* 41 Cal.4th 825, 836, fn. 2.) The amended section 1170 now provides that: (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states. Section 1170 now states in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).)[10]

Here, the trial court sentenced appellant on February 6, 2008. The trial court's stated reasons for imposing the upper term are amply supported by the record and its upper term sentence complies with the requirements of amended section 1170, subdivision (b).[11] Therefore, there is no federal constitutional violation under *Cunningham*.

V. *No-Contact Order*

Appellant contends, and the People concede, the no-contact order imposed by the court should be stricken.

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[10] Effective January 1, 2009, section 1170, subdivision (b), was amended without substantive effect. (Stats. 2008, ch. 179, § 180.)

[11] Even assuming that under rule 4.420(d) the court's great bodily injury factor constitutes an impermissible dual use of facts which also supported the section 12022.7, subd. (e) great bodily injury enhancement, the remaining factors were sufficient to justify the court's imposition of the upper term.

At sentencing, the court ordered appellant to "stay away from and have no contact with" the victim, pursuant to section 136.2. That section provides that during the pendency of a criminal proceeding the court is authorized to issue a restraining order when the court has a "good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur." However, "section 136.2 is limited 'to the pendency of [a] criminal action' because section 136.2 'is aimed at protecting only "victim[s] or witness[es]." ' " (*People v. Selga* (2008) 162 Cal.App.4th 113, 118, quoting *People v. Stone* (2004) 123 Cal.App.4th 153, 159.) Since appellant was not given probation and was sentenced to state prison, the court's no-contact order must be stricken. (*See Selga,* at pp. 118-119; *Stone,* at pp. 158-161.)

DISPOSITION

The no-contact order against appellant is ordered stricken. The judgment is otherwise affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.